



# Chapter VII: The Permanency Plan and Permanency Hearing

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## A. The Permanency Plan and the Permanency Hearing

### 1. Cases Where Aggravated Circumstances Are Found

At the adjudicatory hearing, if the court finds that the child comes within the jurisdiction of the Child Protective Act, and if aggravated circumstances are found, then reasonable efforts to reunify the child with its parents are not required. The court must hold a permanency hearing within 30 days of the adjudicatory hearing, and the agency must file a written permanency plan at least five days prior to the permanency hearing. At the permanency hearing, the court decides whether to approve, modify, or reject the plan.<sup>1</sup>

The most important and most obvious function of the permanency plan is its planning function. The permanency plan provides the road map for resolving the case—for providing the child with a new and permanent family, in as timely a manner as possible. Formulation of the plan requires the agency to systematically analyze the child's needs, the options for the child's placement, and

<sup>1</sup> Idaho Code §§ 16-162; IJR 44.

the advantages and disadvantages of the placement options in light of the child's needs. The requirements for filing a written plan prior to the hearing, the hearing, and court approval of the plan promote systematic analysis of the issues and options by all participants, their attorneys, and the judge. Careful planning is an essential prerequisite to successfully resolving the case and successfully protecting the interests of the child. Careful planning includes diligent investigation and implementation and appropriate modification based on new information or changed circumstances.

An equally important but less obvious function of the permanency plan is its enforcement function. The permanency plan provides the benchmark for objectively measuring the agency's progress toward completing the plan, and it is the primary mechanism for holding the agency accountable. If the court-ordered plan is specific as to the agency's responsibilities, and the agency does not comply, then it makes contempt sanctions available. It also provides a record for a finding that the agency has not made reasonable efforts to finalize a permanent placement for the child, which in turn affects the federal funding available to the agency.

The permanency plan should:

- Identify the current foster care placement for the child, including a statement of why that placement is the least disruptive environment and most family-like setting that meets the needs of the child. (Where the parent has subjected the child to aggravated circumstances, it may be appropriate, for the safety of the child and the foster family, to keep the identity of the foster family confidential. In such instances, the plan should sufficiently describe the nature of the foster case placement to enable the court to assess whether the placement is the least disruptive environment and most family-like setting for the child.)
- Identify the services to be provided to the child and the foster family, including services to identify and meet any special educational, emotional, physical, or developmental needs the child may have, to assist the child in adjusting to the placement, or to ensure the stability of the placement.
- Identify terms for visitation, supervision of visitation, and child support, where appropriate.
- Address all options for permanent placement of the child.
- Assess the advantages and disadvantages of each option, in light of the child's best interests.
- Include recommendations as to which option is in the child's best interests.
- Specifically identify the actions necessary to implement the recommended option and deadlines for those actions.
- Address options for maintaining the child's connection to the community, including individuals with a significant relationship to the child, organizations, or community activities with whom the child has a significant connection.
- Identify further efforts necessary to finalize or implement the plan.

### **2. Cases Where Aggravated Circumstances Are Not Found**

At the adjudicatory hearing, if the court finds that the child comes within the jurisdiction of the Child Protective Act, and if the court does not find aggravated circumstances, then the next step in the case is the planning hearing. IDHW must file a written case plan with the court that includes both a reunification plan and an alternative permanency plan. At the case plan hearing,

the court decides whether to approve, modify, or reject the plan.<sup>2</sup> Once the case plan is approved, the court must hold regular review hearings, where the court reviews the status of the case and the case plan and where the court may enter orders as necessary to ensure the parties' progress on all aspects of the case plan.<sup>3</sup>

If the child continues in state custody, then both state and federal law set deadlines for a permanency hearing. State law requires that a permanency hearing be held within one year from the date the child is removed from the home or the date the child is found to be within the jurisdiction of the CPA, whichever occurs first. The permanency hearing can be combined with the review hearing.<sup>4</sup>

Federal law requires that a permanency hearing be held within one year from the date the child is considered to have entered foster care and at least once every twelve months thereafter. The date a child is considered to have entered foster care is the date the court found the child to come within the jurisdiction of the CPA or 60 days from the date the child was removed from the home, whichever is first. If the deadline for the hearing is not met, the child may lose eligibility for federal funds. Eligibility may be reinstated once the federal requirements are met.<sup>5</sup>

The functions of the review hearing and the permanency hearing overlap somewhat. The case plan is itself a permanency plan, intended to achieve either the permanent reunification of the child with the family or an alternative permanent placement for the child. The purpose of the case plan is to set deadlines for achieving the overall goal of permanent placement, as well as deadlines for the specific tasks necessary to achieve that goal. One of the purposes of the review hearing is to assess the parties' progress on the plan, to enter orders as necessary to ensure the parties' progress on the plan, and to modify the plan as appropriate.

At the permanency hearing, however, the emphasis is more on the time deadlines. The purpose of a child protection proceeding is not only to achieve permanency for the child, but to achieve permanency in as timely a manner as possible. The key function of the permanency hearing is to set a deadline for determining the permanent placement of the child, to determine the permanent placement of the child, and to set a deadline for implementing that placement.

At the permanency hearing, the judge should decide whether a child should be permanently returned home. In most cases, either the child will have been returned home (either with or without agency supervision) by the time of the permanency hearing or efforts to return the child home should cease. In some cases, however, where a family has made substantial progress but the issues have not been fully resolved, reunification may be designated as the permanent plan for the child, with a specific date for the child to return home (either with or without agency supervision) within a short time after the permanency hearing.

In some cases, it is appropriate to schedule permanency planning hearings well before statutory deadlines. Statutory deadlines should be seen as the maximum, rather than standard, deadlines.

<sup>2</sup> Idaho Code § 16-1621; IJR 44. The case plan and hearing are discussed in more detail earlier in Chapter VI.

<sup>3</sup> Idaho Code §16-1622; IJR 45. Review Hearings are discussed in detail in Chapter VIII of this Manual.

<sup>4</sup> Idaho Code §16-1622.

<sup>5</sup> 42 U.S.C. §675(5)(c); 45 C.F.R. §1356.21(b)(2).

For example, where both parents are persistently uncooperative in spite of diligent agency efforts to help them and where there has been no discernable progress within the first six months of placement, an early permanency planning hearing is appropriate. In some cases, a permanency planning hearing is appropriate even sooner.

When the agency does little to assist the family prior to the permanency planning hearing, the permanency planning hearing should not be allowed to function as an ordinary review hearing. Rather, the court should hold frequent review hearings and, when necessary, compel timely agency action to help the family while it is still practical.

### **3. Timing of the Hearing**

In cases where aggravated circumstances were found at the adjudicatory hearing, state law requires the court to hold a permanency hearing within 30 days of the adjudicatory hearing. In cases where aggravated circumstances were not found at the adjudicatory hearing, state law requires that a permanency hearing be held within one year from the date the child is removed from the home or from the date of the adjudicatory hearing, whichever occurs first.<sup>6</sup>

Federal law requires that a permanency hearing be held within one year from the date the child is considered to have entered foster care and at least once every twelve months thereafter. The date a child is considered to have entered foster care is the date the court found the child to come within the jurisdiction of the CPA or 60 days from the date the child was removed from the home, whichever is first. If the deadline is not met, the child may lose eligibility for federal funds. Eligibility may be reinstated once the federal requirements are met.<sup>7</sup>

These deadlines should be seen as maximum, rather than standard, deadlines. A case may move to the permanency hearing whenever it is clear that reasonable efforts to reunify need no longer be made.

As in all child protective proceedings, the court should have a “just say no” policy on continuances. If a continuance is necessary, it should be for a short period of time, and the court should enter appropriate orders to ensure that all parties are prepared to proceed on the new date.

### **4. Agreements by the Parties**

The parties may wish to submit a stipulated permanency plan at the permanency hearing. The Idaho Juvenile Rules require that stipulations be made part of the court record and that they are to be subject to court approval. The court may enter orders and decrees based on stipulations only after making reasonable inquiry to confirm that the parties have entered into the stipulation knowingly and voluntarily, that the stipulation is based on fact, and that the stipulation is in the child’s best interests.<sup>8</sup>

The court should ensure that the permanency plan has been thoroughly considered by all participants, including both parents, if involved. The court should ensure that the stipulated permanency plan is comprehensive and that it addresses all the essential elements of a

<sup>6</sup> Idaho Code §§ 16-1619(6)(d), 16-1620.

<sup>7</sup> 42 U.S.C. §675(5)(c); 45 C.F.R. §1356.21(d).

<sup>8</sup> IJR 38.

permanency plan. The essential elements of a permanency plan are described earlier in this chapter, in Part A.1. If the stipulated case plan is not comprehensive, the court should address any omitted elements. The court might also adjourn the hearing for a short time (such as one day) to give the parties time to address the omitted elements.

For example, a permanency plan that simply states that the parties agree that long-term guardianship with a particular relative is the permanency plan, is insufficient in several respects:

- It does not provide a factual basis for a determination that this option is in the child's best interests – such as why the more permanent option, termination of parental rights and adoption, is either not available or not in the best interests of the child, or whether the relative is able and willing to provide a permanent home for the child.
- It does not provide a factual basis for a case-specific finding that the agency made reasonable efforts to finalize the permanency plan.
- It does not provide a plan, with the specific actions necessary to implement the proposed option and deadlines for those actions, to ensure that the permanent placement is finalized in a timely manner.
- It does not address whether the child has any special needs, or the services to be provided to meet those needs, while the child is in foster care pending the finalization of the permanent placement.

## 5. Who Should Be Present

### **Persons who should always be present at the permanency hearing:**

- Judge
- Parents whose rights have not been terminated, including putative fathers
- Age-appropriate children
- Indian custodian, the child's tribe, and attorney, if applicable
- Foster parents
- Assigned caseworker
- Prosecutor or deputy attorney general
- Attorney for parents (separate attorneys if conflict warrants)
- Guardian *ad litem*, attorney for guardian *ad litem*, and/or attorney for child
- Court reporter or suitable technology
- Security personnel
- Interpreter(s), if applicable

### **a. Judge**

It is important that permanency hearings are conducted by the same judge who hears other stages of the proceedings. The involvement of one judge creates consistency in the directions given to the family and to the agency, avoids rehashing old arguments, and allows the judge or judicial officer who presides over the permanency hearing to be thoroughly familiar with the facts presented at previous hearings.

### **b. Parents whose rights have not been terminated, including putative fathers**

Parents can provide the court with information that is important to the successful development and implementation of the permanency plan.

Even if aggravated circumstances have been found, and no efforts are to be made toward reunification, their participation can be important to the planning process. Until their parental rights are terminated, they have the right to participate in the permanency hearing.

### **c. Age-appropriate children**

Children should be present at some point during the hearing to give the judge the opportunity to observe them. Age-appropriate children can provide the court with information as to their perception of their needs, interests, and concerns. Older children will often have questions regarding their circumstances and their future. Their questions may be answered at the permanency hearing, and the opportunity to participate may allow the child a greater sense of self-determination. A court may choose to have children present only during portions of a hearing. Special circumstances may infrequently justify the absence of children from an entire hearing.

### **d. Indian custodian, child's tribe, and attorney, if applicable**

An Indian child's tribe has the right to notice and the opportunity to participate in all hearings concerning the child.<sup>9</sup> For Indian children, the tribe often has information regarding the child and family that is critical to assisting the court in good decision-making regarding the child.

### **e. Foster parents**

Foster parents who care for and observe children on a daily basis are often in the best position to describe the present status of a child. Foster parents should be present both to make this information available to the judge and to give the judge the opportunity to observe the foster parents.

Idaho law requires the foster parents to be given notice of the case plan hearing, but specifically provides that they are not parties to the action.<sup>10</sup> Because the permanency hearing is part of the planning process, foster parents should be given notice of the permanency hearing as well as the case plan hearing.

### **f. Assigned caseworker**

The caseworker with primary responsibility for the case must be present to provide the court with complete, accurate, and up-to-date information at the hearing. Judges should not continue or delay a review hearing due to lack of information or case involvement by a caseworker. When important facts are not known, the hearing should be reset for an early date, and, if necessary, appropriate subpoenas should be issued.

### **g. Prosecutor or deputy attorney general**

It is important that the IDHW have effective representation at the hearing as the court's decisions concerning the permanency plan are crucial to its success. Important information is elicited at the permanency hearing, and the record established at that time can be critical to later case outcomes; an attorney is needed to help develop the record and to note important evidence. The agency attorney can further help the case to progress by moving for court-ordered evaluations, excluding a perpetrator from a household, or obtaining information important to the case. Depending on the jurisdiction, the agency may be represented by the county prosecutor or the state attorney general.<sup>11</sup>

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<sup>9</sup> ICWA, 25 U.S.C. §§ 1912(a), 1911(c). *See* Chapter XI of this Manual.

<sup>10</sup> Idaho Code §16-1621(2).

<sup>11</sup> Idaho Code §16-1610.

**h. Attorneys for parents (separate attorneys, if conflict warrants)**

The presence of the parents' attorney at the permanency hearing is vital to make sure that the agency is carrying out its responsibility to assist the parents. The attorney needs to correct the record to avoid negative or inaccurate information about the parents. The attorney needs to make sure that the parents' interests and views are taken into account in all decisions regarding the permanency plan, including placement, visitation (where appropriate), and services.

**i. Guardian *ad litem*, attorney for guardian *ad litem*, and/or attorney for child**

A well-trained legal advocate for the guardian *ad litem* and/or the child must be present to make sure that the child's interests are being protected and are not being subordinated to the organizational needs of the agency or to the convenience of agency personnel. The advocate also needs to ensure that the views of children are considered by the court.<sup>12</sup>

**j. Court reporter or suitable technology, security personnel, interpreter**

As in other stages of the hearing process, these staffing and equipment resources should be available for all permanency hearings. If a parent or other essential participant is not fluent in English, a qualified interpreter must be present.

**k. Persons whose presence may also be needed at the permanency hearing:**

- Extended family members
- Other custodial adults (such as a representative from a residential facility where a child is placed)
- Prospective adoptive parents (if other than the foster parents)
- Adult or juvenile probation officer or parole officer
- Service providers
- School officials
- Other witnesses

Extended family members, service providers, and others who work with the family can provide valuable information and recommendations to the court, and it can be helpful for all persons who are involved with the child to meet with each other. However, their presence may be needed only if they will play a role in the permanency plan or if their testimony is needed on a disputed issue.

**6. Key Decisions the Court Should Make at the Permanency Hearing**

The essential decision the court must make at the permanency hearing is whether to approve, modify, or reject the permanency plan. To make that decision, the court should decide the following.

<sup>12</sup> See Idaho Code §16-1614, which provides for appointment of a guardian *ad litem* for the child, appointment of an attorney for the guardian *ad litem*, and/or appointment of an attorney for the child.



**a. Whether the current foster care placement is the least disruptive and most family-like setting that meets the needs of the child**

If a child will not be permanently reunified with his or her parents, the child's foster family placement will ideally become the child's permanent placement. It is therefore essential to assess the foster care placement both in terms of the child's immediate needs and the child's long-term needs.

Placement with an individual or couple who already has a positive relationship with the child helps to provide the child with a greater sense of safety, security, and continuity. The extended family is the most likely, but not the only, source for such individuals or couples. Placement with a family member may also offer the opportunity for an agreed-upon solution to the problem, as a parent may be willing to stipulate to placement of the child if the parent knows the child will be with a family member.

There can, however, be problems with the placement of a child with a family member. First, because of the family member's relationship to the parent, and given the sometimes intergenerational aspects of neglect and abuse, the family member may unduly minimize the extent or the effects of the abuse or neglect, may be partly or primarily motivated by a desire to protect the parent from governmental intervention, or may also have a history of abusing or neglecting children.

Second, the family member may underestimate the potential difficulties in providing a home for the child, particularly since an abused or neglected child will likely have emotional, developmental, or behavioral problems that do not simply disappear when the child is removed from the abusive or neglectful parent. The family member may later seek to withdraw as a foster parent when unanticipated problems become apparent, creating further trauma for the child.

The court should make careful inquiry of the family member with whom the child will be living, ensuring that the family member understands the nature and extent of the commitment the family member is making. In addition, the process of licensing the family member as a foster care provider should assist in addressing these potential problems.

There is a preference for keeping siblings together. A child who has been removed from his or her parents should not also suffer the loss of being separated from brothers and sisters. If siblings can't be placed together, then the plan should address the provisions that will be made so that the siblings can maintain contact with each other. Separate placement of siblings may be necessary where one sibling is a juvenile offender and the other children are at risk of harm from the juvenile.

ICWA has detailed provisions governing preferences for both foster and adoptive placement of Indian children. Priority is given to members of the child's extended family, other members of the child's Indian tribe, or placements given priority by the child's Indian tribe.<sup>13</sup> One of the purposes of ICWA is to recognize the unique relationship between the United States and the

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<sup>13</sup> 42 U.S.C. §1915.

Indian tribes;<sup>14</sup> another purpose is to enable the child to develop and/or maintain the child's ties to his or her cultural heritage.<sup>15</sup> ICWA is discussed in detail in Chapter XI of this Manual.

Issues of race, ethnicity, and national and cultural heritage in foster and adoptive placements are highly controversial. ICWA establishes preferences for placement of Indian children with Indian families. There is no law establishing similar preferences for other groups. The Multiethnic Placement Act of 1994, as amended, points the other way; it limits the extent to which race, ethnicity, national, or cultural heritage may be considered in placement decisions.<sup>16</sup> The purpose of that Act was to remove barriers to permanency by prohibiting discrimination against children or prospective parents based on race or national origin. Specifically, the Act sought to do away with the practice of "race-matching," which resulted in large numbers of children spending long periods of time in foster care, waiting for prospective adoptive parents of the same race.

Ultimately, the resolution in any case will depend on the individual circumstances of that case. Although preferences may provide useful tools for analysis, the successful placement of the child ultimately depends on thorough efforts to identify all possible placements and thorough assessment of the advantages and disadvantages of each placement based on the child's individual needs. *IDHW has a best practices manual that identifies the long-term interests of the child and the many considerations involved.*

When the court places a child in the custody of the agency, state law vests authority for the placement decision in the agency, subject to review by the court.<sup>17</sup> Federal law requires that placement authority be vested in the agency for the child to be eligible for federal funds.<sup>18</sup> It is unclear whether the child will lose eligibility for federal funds if the court orders a particular placement for a child when custody of the child is vested in the agency.

Presumably the child would not lose eligibility if the placement were a contested issue and the court determined the issue based on evidence in the record or on a reasonable agreement of the parties. The U.S. Department of Health and Human Services has a website with questions and answers about ASFA, in which the USDHHS states that "[a]s long as the court hears the relevant testimony and works with all parties, including the agency with placement and care responsibility, to make appropriate placement decisions, we will not disallow payments."<sup>19</sup> The court can also require the agency to include the child's foster care placement in the permanency plan and can then reject a plan that includes an inappropriate placement.

The plan should address the options for maintaining the child's ties to family, friends, or organizations that have a significant role in the child's life. The child's placement may afford the means for maintaining these significant connections. If not, then other means to maintain the child's significant connections should be explored and identified.

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<sup>14</sup> 42 U.S.C. §1901.

<sup>15</sup> 25 U.S.C. §1902.

<sup>16</sup> 42 U.S.C. §§ 1996(b). MEPA is discussed in Chapter X of this Manual dealing with adoption.

<sup>17</sup> Idaho Code §15-1629(8).

<sup>18</sup> See 45 C.F.R. 1356.71(d)(1).

<sup>19</sup> See question and answer no. 13 at [www.acf.dhhs.gov/programs/cb/laws/qsett1.htm](http://www.acf.dhhs.gov/programs/cb/laws/qsett1.htm).

**b. Whether the plan specifically identifies the services to be provided to the child and/or the foster family**

The agency should assess whether the child has any special needs and identify the services to be provided to address those needs. For example, the child may have special emotional, physical, educational or developmental needs. The court should inquire whether evaluations need to be performed by medical health professionals, mental health professionals, or child development specialists to determine whether the child has special needs and what services are available to address those needs. The child may also have behavioral problems as a result of the parents' abuse or neglect or may need services to assist in adjusting to a new home. The child may have delinquency issues, and the plan may need to incorporate measures for agency personnel to coordinate with the child's juvenile probation officer or a representative from the juvenile corrections agency.

In investigating the resources available to meet the child's needs, efforts should be made to identify all the potential sources of services or assistance, including other programs available through the same agency, programs available through other agencies, or programs available through private foundations. Resources available from other agencies or private foundations are often overlooked. For example:

- When the child reaches age 15½, IDHW is required to assess the child for independent living skills and special programs available under the independent living grant money that IDHW administers.<sup>20</sup>
- A child with developmental disabilities qualifies for numerous services funded by Medicaid. The Adult and Child Development Centers offer services for developmentally disabled children and adults.<sup>21</sup>
- Children with developmental disabilities and children approaching the age of 18 may qualify for services from the Division of Vocational Rehabilitation, part of the Idaho Department of Education.<sup>22</sup>
- The Casey Program is a private foundation in Idaho, operating primarily in Ada County. In addition to providing adoptive and temporary homes for teenagers and services for Casey families, the program also provides resources to other children in foster care.<sup>23</sup>

The agency should also address services to be made available to the foster parents. Just as the child may need assistance in adjusting to a new home, the foster family may need assistance in adjusting to a new member in the home. The foster parents may need education or counseling as to the effects of abandonment, abuse, and neglect to deal with the problem behaviors that can arise and to assist the child in emotional healing and in adjusting to a new home. If the child has special needs, the foster parents may need assistance in obtaining information, skills, or services to assist them in meeting those needs.

<sup>20</sup> Idaho Admin. Code § 16.06.01.030(10).

<sup>21</sup> See, e.g., Idaho Admin Code § 16-04.11.010 *et seq.*

<sup>22</sup> See Idaho Admin. Code § 47.01.01.700 *et seq.*

<sup>23</sup> Information about the Boise field office of Casey Family Programs is available at <http://www.casey.org/FriendsAndFamilies/Communities/CaseyOffices/Boise/default.htm>.

**c. Whether the plan includes appropriate terms for visitation and child support, if appropriate**

To the extent that maintaining the relationship is in the child's best interests and is consistent with the permanent plan for the child, it is important that the child have the opportunity for regular and meaningful contact with the parent, . It is equally important that visitation include appropriate terms and conditions to protect the child's safety, to protect the child from undue distress that may result from a parent's inappropriate behavior during visitation, and to avoid disruption of the child's foster care placement.

The plan should set forth provisions as to the frequency, duration, location, supervision, or other terms or conditions of visitation. Parents who are able to pay should be expected to help cover the costs of foster care, and the amount and frequency of child support should be addressed in the permanency plan.

**d. Whether the permanency plan addresses all options for permanent placement of the child**

The options for permanency fall into the following general categories: reunification with the parents, adoption and termination of parental rights, long-term guardianship, and long-term foster care. In addition to addressing these general options, the plan should address specific options within each category. For example, with respect to termination of parental rights and adoption, the plan should include an assessment of each potential adoptive family.

**i. Reunification**

The most preferred option for permanency is the safe and permanent reunification of the child with its parents. The preference for reunification is embodied in the requirement that the agency must make reasonable efforts to reunify the child with the family, unless the court finds that the parent(s) subjected the child to aggravated circumstances.<sup>24</sup>

If the court has found aggravated circumstances, then the permanency plan will not include reunification as an option. If the court did not find aggravated circumstances at the adjudicatory hearing, then by the time of the permanency hearing, in most cases the child will either have been returned home or efforts to return the child home should have ceased.

In some cases, it may be appropriate to approve an extended period of foster care for a specific time, with a continued plan of reunification. This may be an appropriate plan where:

- the parent has made substantial progress toward reunification,
- the parent has maintained a close and positive relationship with the child, and
- it is likely that the child can safely return home in the near future.

In such cases, the court should carefully review the progress the parties have made in resolving the issues identified in the case plan. The court should carefully specify the further efforts necessary to fully resolve the issues, including the specific actions to be completed by the parties (short deadlines for their completion) to avoid repeated decisions to leave a child in foster care with a goal of reunification.

<sup>24</sup> Idaho Code §16-1608(6)(d). The determination of aggravated circumstances would normally be made at the adjudicatory hearing.

### ii. Termination of parental rights and adoption

The second preferred option for permanency is termination of parental rights and adoption. The goal of permanency is to provide the child with a family relationship that will last throughout the child's life, with full and permanent responsibility to the new parents that is legally secure from modification and without ongoing state intervention and/or monitoring.

Termination of parental rights is the second-most preferred option because it meets all the goals of permanency. In addition, adoption subsidy benefits are available to assist the adoptive parents and to meet the child's needs.

The preference for termination of parental rights and adoption is embodied in two provisions of state law:

- Where the parent subjected the child to aggravated circumstances or where the child is an abandoned infant, the state is required to file a petition to terminate parental rights unless there are compelling reasons why it would not be in the child's best interests.<sup>25</sup>
- Where a child has been in the custody of the agency for 15 of the last 22 months, the state is required to file a petition to terminate parental rights, unless the court finds that it is not in the best interests of the child, that reasonable efforts have not been provided to reunite the child with its parents, or the child is placed permanently with a relative.<sup>26</sup>

In determining whether the plan identifies all the options for permanent placement, the court should inquire as to the efforts the agency has made to identify and assess potential adoptive parents, including both relatives and non-relatives, both locally and in other jurisdictions. There is a preference for placement with family members, and among family members, there is a preference for those who already have a positive relationship with the child. The ultimate criteria, nonetheless, remains the child's best interests, so the preference for a family member can be outweighed by other factors.

Adoption should not be quickly dismissed simply because a child is older or has special needs. Adoption subsidies, compacts for interstate placements, and other programs, including programs specifically for older children and special needs children, have greatly increased the number of families who are both willing and able to provide a safe home and a loving family for an older child or a special needs child. *With rare exceptions, there should no longer be children labeled "unadoptable."*

"Adoption with contact" can be an option in some cases. Adoption with contact may be the practical result where the child is adopted by a family member. In other cases, a voluntary agreement between the adoptive parents and the birth parents for post-adoption contact may promote an agreed-upon resolution of the case and be in the best interests of the child. A post-adoption contact agreement is purely voluntary and rarely enforceable in court. Despite this

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<sup>25</sup> Idaho Code §16-1624.

<sup>26</sup> Idaho Code §16-1629(9).

uncertainty, voluntary arrangements for post-adoption contact may be a good solution in some cases.<sup>27</sup>

Post-adoption contact agreements are more likely to be of benefit in situations where there is a substantial degree of mutual trust between the birth parents and the adoptive parents. The contract should specifically provide that any rights the parent(s) may have under the contract are based solely on the contract and not on the continued existence of any parental rights and that the adoption is irrevocable, even if the post-adoption contact agreement is violated, modified, or set aside.

### **iii. Guardianship**

The third option for permanent placement is long-term guardianship. In appropriate circumstances, guardianship can have several advantages over termination of parental rights and adoption.

First, guardianship does not affect the child's right to financial benefits from or through the parents, such as child support, inheritance, or Social Security. Second, a guardianship is flexible. The order appointing the guardian can include whatever provisions are appropriate for the child to have continuing contact with either or both parents (to the extent that continuing contact is in the child's best interests) and can readily be modified as circumstances change.

Finally, guardianship may thus offer the potential for an agreed-upon solution that has the active support of all parties and avoids contested termination proceedings. For example:

- A parent might be threatened by the loss of the sense of identity from having his or her parental rights terminated, yet at the same time be unable or unwilling to actually fulfill the role of a parent. If the threat to the parent's sense of identity is removed, the parent may be supportive of an alternative arrangement that allows the child to develop a parental relationship with the guardian.
- A family member may be committed to providing the child with a parental relationship through guardianship, but may object to adoption, feeling that the guardian's responsibility already arises through the family relationship without the need for termination and adoption.
- The potential guardian may be willing to take on the challenge of a troubled child, but not willing to take the risk of financial responsibility for the child's negligent or criminal actions.
- An older child may object to adoption and may rebel against an adoptive placement, but may accept the same placement if it is in the form of a guardianship.

Guardianship also has significant disadvantages. Most importantly, guardianship fails to achieve most of the aspects of permanency. As previously discussed, the goal of permanency is to provide the child with a family relationship that will last throughout the child's life, and will vest full and permanent responsibility to the new caregiver without ongoing state intervention and/or monitoring. Guardianship automatically terminates when the child reaches majority, and in

<sup>27</sup>See ADOPTION 2000: THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE, GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCY FOR CHILDREN (U.S. Department of Health and Human Services, June 1999).

some instances before. Guardianship is subject to modification at any time, which can also make it subject to repeated litigation. It is also subject to ongoing monitoring until the guardianship is terminated.

Although guardianship may offer the potential for settlement, it is too often used as a quick and easy means to settlement, and the placement does not receive the careful scrutiny necessary to ensure that the placement is in the child's best interests. For example, although relative placements are generally favored, guardianship by a relative should receive the same scrutiny as adoption by a non-relative. Because of the proposed guardian's relationship to the parent, and given the sometimes intergenerational aspects of neglect and abuse, the relative may unduly minimize the extent or effects of the abuse or neglect, may be partly or primarily motivated by a desire to protect the parent from governmental intervention, or may also have a history of abusing or neglecting children.

In addition, a person who is willing to undertake guardianship but is not willing to undertake adoption may be underestimating the responsibilities of guardianship, sometimes with damaging consequences for the child. A guardian may not be fully aware of the difficulties, particularly since an abused or neglected child is likely to have emotional, developmental, or behavioral problems that do not simply disappear when the child is removed from the abusive or neglectful parent. The guardian may later seek to resign when unanticipated problems become apparent. A well-meaning but ill-prepared guardian who decides he or she no longer wants the child will exacerbate the child's feelings of rejection and further contribute to the child's emotional, developmental, or behavioral problems.

The financial benefits or assistance that are available in adoption are **not** available in guardianship. The adoption subsidies that are available to assist adoptive families and special needs children are not available in guardianships. Most insurance policies that will cover a guardian's biological or adoptive child, such as medical or life insurance policies, will not cover a ward.

Finally, the guardian is appointed in a proceeding separate from the child protection proceeding, and many of the protections available in CPA cases are not available in guardianship proceedings. The parents do not have the right to court-appointed counsel. The child does not have the right to a court-appointed guardian *ad litem*. The services of the agency and the guardian *ad litem* are not available to monitor the child's welfare while in the care of the guardian, or to find a new placement for the child if the guardian resigns, both of which may be necessary in some circumstances. Services may not be available to assist the guardian or the child, except to the extent the guardian or child qualifies under other programs independent of the CPA proceedings. In some cases, such services may be appropriate or necessary to ensure the success of the placement, particularly where the child has special needs and the guardian has limited resources.

Before guardianship is selected as the placement for the child, the parties and the court should thoroughly explore termination of parental rights and adoption as an option. The appropriateness of a proposed guardian should be scrutinized as carefully as proposed adoptive parents. The court should ensure through careful inquiry that both the parents and the guardian understand

that upon appointment, the guardian will be undertaking a responsibility that is intended to be as permanent and complete as parental responsibilities, subject only to the rights that are reserved to the parents under the guardianship statute or in the order appointing the guardians.

If guardianship is selected, the court should make findings as to why a guardianship is more appropriate for the needs of this child than termination of parental rights and adoption. If the child has not previously resided with the guardian for a substantial period of time, the court may keep the CPA case open and schedule a further review hearing to ensure that the placement will be successful and to maintain jurisdiction of the case in the event the placement is not successful.

**iv. Long-term foster care**

Long-term foster care is the least preferred option for permanent placement, and the situations in which it is appropriate are limited. Long-term foster care may include placement with a foster family, a group home, or a residential facility. The court must find compelling reasons for approving long-term foster care as the permanent placement for the child. There are three types of situations in which long-term foster care is likely to be the best or only option.

The first situation is where the child is a violent juvenile offender or a juvenile sex offender. In these cases, even if a willing family could be found, placement of the child in a family setting may place the other family members at risk. In such cases, the permanency plan should include provisions for coordination with personnel from the juvenile corrections agency and for rehabilitation of the juvenile in a secure residential setting, in the hope that the child may later be able to function outside an institutional setting.

The second situation is where the child has such serious and chronic disabilities that the child cannot function in a family setting or requires more care than can be provided in a family setting. The permanency plan should include provisions for services to address the child's special needs, particularly those needs that may enable the child to someday function in a more family-like setting. Even if the child cannot currently function in a family setting, the agency should seek a family who will visit the child and open their home to visits from the child.

The third situation is where long-term care is part of a transitional living situation to prepare a youth for adulthood. Where long-term foster care with emancipation is the proposed permanency plan, the court should examine why long-term foster care is the most appropriate way of preparing the youth for adulthood and maintaining family ties.

A child should not, however, be left in foster care simply because a child is older or has special needs. Adoption subsidies, compacts for interstate placements, and other programs, including programs specifically for older children and special needs children, have greatly increased the number of families who are both willing and able to provide a safe home and a loving family for an older child or a special needs child. *With rare exceptions, there should no longer be children labeled "unadoptable."*

If long-term foster care will be the permanent plan for the child, the permanency hearing should be followed by frequent review hearings to ensure that appropriate services are provided to the



child and to determine if circumstances have changed sufficiently so as to allow the child to function in a family setting. Review hearings are discussed in Chapter VIII, below.

**e. Whether the plan assesses the advantages and disadvantages of each option, in light of the child's best interests**

The ultimate standard for selecting the permanent placement for the child is the child's best interests. The purpose of permanency planning is to systematically identify the options and select the option that is in the child's best interests. The purpose of the written permanency plan is to promote systematic analysis by all participants. The permanency plan should therefore include an assessment of the advantages and disadvantages of each option, in light of the child's best interests.

**f. Whether the recommended option for permanent placement of the child is in the child's best interests**

If the proposed permanent placement for the child is a short extension of foster care with a permanent plan of reunification, the court should ask, and the participants should answer the following questions:

**g. How has each of the issues identified in the case plan been resolved?**

**h. How often is visitation occurring, and what is the impact on the child?**

**i. What is the date for the child's return home and the detailed plan for supervision after the child is returned home?**

**j. What services are to be provided to the child and the family after the child returns home? In what services will the parents be required to participate?**

**k. Why is this plan in the best interests of the child?**

Ideally, as the efforts of the parents and the agency resolve the issues identified in the case plan, state intervention should be "stepped down" —from placing the child in the legal custody of the agency, to placement in the child's home subject to agency supervision, to allowing the child to remain in the home without agency supervision, and finally to closing the case. The case should not be "dropped down" from placing the child in the legal custody of the agency to returning the child home and immediately closing the case.

Continued agency supervision after the child is returned home is necessary to ensure that reunification is successful and to avoid the "revolving door" phenomena. The revolving door is where a child is returned home and a case is closed, only to have a new petition filed when the child is again subjected to parental neglect or abuse. It may be appropriate to place conditions that must be satisfied for the child to remain in the home, such as home inspections, drug testing, or continued participation in counseling or other services. It may also be appropriate to "transition" the child's return home with longer or more frequent visitations prior to the permanent return home.

**i. Special concerns if proposed permanent placement is TPR and adoption**

If the proposed permanent placement of the child is termination of parental rights and adoption, the court should ask, and the participants should answer, the following questions:

- What are the facts and circumstances supporting grounds for termination of parental rights?
- If aggravated circumstances were not found, what efforts were made to reunify the family? Were these efforts reasonable?
- Why is this plan in the best interests of the child?
- Has the petition to terminate parental rights been filed, and if not, by what date will it be filed?
- Are there relatives who will adopt the child if termination is granted? If not, why not? Are further efforts needed to identify and assess relatives as potential adoptive parents? If so, what?
- If adoption by a relative is not the plan, is adoption by foster parents the plan? If not, why not?
- Are there other adults with whom the child has or has had a positive relationship, and are they potential adoptive families?
- If an adoptive home must be recruited, what efforts are being made to identify potential adoptive families, both locally and in other jurisdictions?
- Will adoption with contact be recommended? Why or why not?
- If the child is an Indian child, have ICWA requirements been met?
- Does the parent want to relinquish parental rights at this time?

If the parent wants to relinquish parental rights, the court should be prepared to go forward with voluntary termination at the permanency hearing. To voluntarily terminate parental rights, the parent must sign a consent to termination, in the form required by statute, in the presence of the judge.<sup>28</sup> The judge should make careful inquiry to make a record that the consent to termination was signed knowingly and voluntarily. A list of proposed questions for voluntary termination is included at the end of this chapter.

With respect to Indian children, ICWA does not permit the agency to stop making efforts to reunify the child with the family unless the court finds, beyond a reasonable doubt, and including testimony by an expert witness, that continued custody by the parent or Indian custodian will likely result in serious emotional or physical damage to the child. ICWA further requires that efforts to reunify be not only reasonable, but active.<sup>29</sup> As previously noted, ICWA also sets forth detailed provisions for preferences in both the foster and adoptive placement of Indian children.<sup>30</sup> Before any permanent placement of an Indian Child is undertaken by the court, Chapter XI of this Manual regarding ICWA should be consulted.

**ii. Special concerns if the proposed permanent placement is guardianship**

If the proposed permanent placement of the child is guardianship, the court should ask, and the participants should answer, the following questions:

<sup>28</sup> Idaho Code §16-2005(f).

<sup>29</sup> 25 U.S.C. §1912(f).

<sup>30</sup> 25 U.S.C. 1915.

- What are the facts and circumstances supporting grounds for termination? What are the facts and circumstances refuting the grounds for termination?
- Why is this plan in the best interests of the child? What are the facts and circumstances showing that guardianship is more in the best interests of the child than termination of parental rights and adoption?
- If aggravated circumstances were not found, what efforts were made to reunify the family? Were those efforts reasonable?
- What are the facts and circumstances demonstrating that the individual or couple with whom the child is to be placed is the most appropriate to serve as a permanent family to the child?
- Is the child living with the proposed guardian? If not, why not?
- Has there been full disclosure to the proposed guardian of the child's circumstances and special needs?
- What is the detailed plan to ensure that this placement will be stable?
- What are the plans to continue any necessary services to the child or the child's guardian, and how will those services be funded after the guardianship is finalized?
- What contact will occur between the child and the birth family, including parents, siblings, and other family members?
- What financial support will be provided by the birth parents?

Because guardianship does not have the same permanency as termination of parental rights and adoption, the plan to ensure the stability of the placement is an important consideration in determining whether the placement is in the child's best interests. Similarly, because there are subsidies available to adoptive parents that are not available to guardians, the plan for post-guardianship services, including funding those services, is an important consideration in determining whether the placement is in the child's best interests.

### **iii. Special concerns if the proposed permanent placement is long-term foster care**

If the proposed permanent placement of the child is long-term foster care, the court should ask, and the participants should answer, the following questions:

- What are the compelling reasons not to proceed with reunification, termination of parental rights and adoption, or guardianship?
- What is the long-term plan for the care of this child, and why is that plan in the best interests of the child? How will this plan provide stability and permanency for the child?
- Is the child already living in the home that will be the child's long-term placement? If not, why not?
- If aggravated circumstances were not found, what efforts were made to reunify the family? Were those efforts reasonable?
- What contact will occur between the child and the birth family, including parents, siblings, and other family members? How often is visitation with the parents occurring, and what is the impact on the child?
- What financial support will be provided by the birth parents?
- If the child is a teenager, what is the plan to prepare the child for independent living?

If the child is a teenager, it is particularly important that the plan identify the independent living services that are to be provided to the child *before the child reaches the age of eighteen*.

Independent living services can be available after the child turns eighteen, but once the child turns eighteen, the court loses jurisdiction and can no longer ensure that the child receives the services.

**l. Whether the permanency plan specifically identifies the actions necessary to implement the recommended option and the deadlines for those actions**

The permanency plan should not be a bare statement of the intended long-term placement of the child, such as “termination of parental rights and adoption” or “guardianship.” The permanency plan should be an actual plan, which specifically identifies the actions necessary to implement the child’s permanent placement and the deadlines for those actions. Following the approval of the permanency plan, the court must hold regular review hearings. The detailed plan provides the benchmark for ensuring that the participants make diligent efforts to implement and finalize the child’s permanent placement. Review hearings are discussed in Chapter VIII, below.

If the permanency plan will be termination of parental rights and adoption, the plan should include a deadline for filing the termination of parental rights and deadlines for the studies that must be done to finalize an adoption.<sup>31</sup> Because these studies can take some time to complete, *adoption studies should be initiated as early in the process as possible, and the court should monitor the progress on completion of the studies.* The petition to terminate will be filed in the CPA proceedings, so the same judge will be able to monitor the progress of the termination case.

If the permanency plan will be guardianship, the plan should include a deadline for filing the petition for guardianship. If the guardianship proceeding will be filed in the same county as the CPA case, the guardianship case should be assigned to the same judge, and the same judge will be able to monitor the progress of the guardianship case. In some instances, however, the guardianship will then be filed in another jurisdiction in the same state or in a different state. In those cases, the judge in the CPA case should communicate with the judge in the guardianship case to enlist the assistance of the judge in the guardianship case in calendaring the guardianship case as promptly as possible.

**m. Whether the permanency plan includes options for maintaining the child’s connection to the community**

The permanency plan should contain options for maintaining the child’s connection to the community, including individuals with a significant relationship to the child, organizations, or community activities with whom the child has a significant connection.

Maintaining connections that are significant to the child is important to the child’s sense of safety and security and to the child’s ability to adjust to a new placement. Ideally, the child’s permanent placement will provide this type of continuity for the child. Maintaining a child’s significant connections is one of the reasons for the placement preference for family members or other adults with whom the child has a positive relationship. Sadly, the placement that is in the child’s best interests will sometimes result in the severance of some connections that are important to the child. It is therefore essential that the plan identify means to maintain the child’s other significant connections.

<sup>31</sup> See Idaho Code §16-1506(3).

**n. Whether further efforts are needed to finalize or implement the plan, and if so, what efforts**

Of course, the court should not simply determine whether the plan includes every appropriate component or whether it includes appropriate provisions in each component. To the extent the plan is inadequate in any respect, the court should either modify the plan or reject the plan and identify the respects in which the plan is inadequate. The agency and other participants can be more effective in meeting the judge's expectations if they know what those expectations are.

**o. Whether the agency has made reasonable efforts to finalize the permanency plan**

*The court must make a case-specific finding that the agency made reasonable efforts to finalize the child's permanent placement, and the finding must be documented in the court records.*

As stressed throughout this Manual, this finding is required by federal and state law. If the findings are not made, the child may lose eligibility for federal funds. Eligibility may be reinstated once the required finding is made.<sup>32</sup> In cases where aggravated circumstances have not been found, reasonable efforts to finalize the child's permanent placement would include reasonable efforts to reunify the family.

★★★Federal Law requires a case-specific documented finding that IDHW made reasonable efforts to finalize the child's permanent placement. If this finding is not made the child's IV-E funding is jeopardized.

The court's consideration of the previous issues will provide the basis for the court's determination of this issue. For example, in assessing the child's options for permanent placement, it will become apparent whether or not the agency has made reasonable efforts to identify and assess potential options for placement; in assessing the plan for implementing the recommended placement, it will become apparent whether or not the agency made reasonable efforts to identify the specific actions necessary to implement the placement and the deadlines for those actions.

There may be instances where the court identifies further efforts to be made by the agency to finalize the permanency plan, such as further investigation to identify or assess potential adoptive families or potential guardians. The fact that further efforts are necessary does not necessarily mean that the agency has failed to make reasonable efforts. For example, the need for further efforts may be the result of new information that was not previously available to the agency or changed circumstances that the agency could not reasonably anticipate and not the result of lack of effort by the agency.

**p. The time and date for the next hearing, and whether any orders are needed to prepare for the next hearing**

Idaho law requires the court to conduct a review hearing no later than six months after entry of the order finding the child to be within the jurisdiction of the Child Protective Act and every six months thereafter, so long as the child is in the custody of the agency.<sup>33</sup> Recommended best practice is for the court to hold review hearings every three months. Recommended best practice

<sup>32</sup> 42 U.S.C. §675(5)(c); 45 C.F.R. §1356.21(b)(2).

<sup>33</sup> Idaho Code §16-162(3).

is for the court to conduct regular review hearings in all cases where the child is found to be within the jurisdiction of the Act, whether the child is in the legal custody of the agency or placed under the protective supervision of the agency in the child's own home. More information regarding review hearings is found in Chapter VIII, below.

The court should set the date and time for the review hearing on the record prior to the conclusion of the permanency hearing. The court should also enter any orders necessary to ensure that all participants are prepared for the next hearing. For example, transport orders may be necessary if a parent is in the custody of the Idaho Department of Corrections or in county jail or if a child is in the custody of the Idaho Department of Juvenile Corrections or in detention.

## **7. Submission of Reports to the Court**

The permanency plan is, in effect, the written report of the agency for the permanency hearing. The permanency plan should include all the elements described in the introduction to this section. The court may also require the guardian *ad litem* to prepare a report for the permanency hearing addressing all or part of the issues to be addressed at the permanency hearing.<sup>34</sup> If the court requires the guardian *ad litem* to file a report, recommended best practice is to require the guardian *ad litem* to file and serve copies of the report on the parties at least five days prior to the hearing. If the court intends to require a written report of the guardian *ad litem* at the permanency hearing, the order for a report should be entered at the hearing where the permanency hearing is scheduled (normally, the adjudicatory hearing, if aggravated circumstances are found, or the review hearing, if aggravated circumstances are not found).

## **8. The Court's Written Findings of Fact, Conclusions of Law, and Order at the Permanency Hearing**

The court should make written findings of fact and conclusions of law, in language understandable by the parties and with enough detail to support later court actions. As in other stages of the proceedings, the burden of preparing findings can be sharply reduced by incorporating well-prepared reports submitted by the agency or other participants. Once a plan is approved, or approved with modifications, the court should enter an order incorporating the plan and directing all participants to comply with the plan.<sup>35</sup> It is particularly important that the written findings, conclusions, and order include the following.

- If any necessary parties were not present, a finding that proper notice was given.
- An order approving the permanency plan and ordering the participants to comply with the plan; an order modifying the permanency plan and ordering the participants to comply with the plan as modified; or an order rejecting the permanency plan, ordering the preparation and filing of a new plan by a specified date, and with findings as to the defects to be remedied in the new plan.
- A case-specific finding as to whether the agency made reasonable efforts to reunify the family (where aggravated circumstances were not found) and whether the agency made reasonable efforts to finalize a permanency plan. If this finding is not made, the child may lose eligibility for federal funding. Eligibility may be reinstated once the required finding is made.<sup>36</sup>

<sup>34</sup> See Idaho Code §16-1634.

<sup>35</sup> C.f. Idaho Code §16-1621(4).

<sup>36</sup> 25 U.S.C. §675(5)(c); 45 C.F.R. §1356.21(b)(2).

- A case-specific finding as to why the permanent plan for the child is in the child's best interests.
- If aggravated circumstances were found at the adjudicatory hearing, and if the permanent plan for the child is not termination of parental rights and adoption, case-specific finding as to the compelling reasons why termination of parental rights and adoption is not in the child's best interests.
- If long-term foster care is the permanent plan for the child, a case-specific finding as to the compelling reasons why reunification, termination of parental rights and adoption, or guardianship is not in the best interests of the child.
- An order scheduling the next hearing and any orders necessary to prepare for the next hearing.

### B. Conclusion

The permanency plan is **essential** to achieving timely permanency for the child. The key function of permanency planning is to promote the systematic investigation and assessment of the child's options for permanent placement, in light of the child's best interests. The key functions of the permanency hearing are to establish a deadline for determining the child's permanent placement, to determine the child's permanent placement, and to determine the plan for implementing that placement. The key functions of the permanency plan are to identify the actions necessary to implement the placement and to set deadlines for those actions. The plan, incorporated in the court's order, sets the benchmark against which future progress will be measured and provides the primary mechanism for holding the participants accountable for their responsibilities in implementing in the plan.